Timothy Borders, et al.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF CHELAN

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Petitioners,
v.
King County and Dean Logan, its Director of Records, Elections and Licensing Services, et al.,
Respondents.
v.
Washington State Democratic Central Committee,
Intervenor-Respondent,
v.
Libertarian Party of Washington State et al.,

No. 05-2-00027-3

PETITIONERS' OPPOSITION TO WSDCC'S MOTION TO STRIKE

I. INTRODUCTION

Intervenor-Respondents.

Intervenor Washington State Democratic Central Committee ("Democratic Party") asks this court to strike relief from the Petition. The motion glosses over the fact that Petitioners have requested (1) relief explicitly provided for by the election contest statute – setting aside the results of the election and nullifying the Certificate of Election – and (2) relief previously approved by the Washington Supreme Court – ordering a re-vote or new

election where, because of the neglect of elections officials, it was impossible to determine who received the most valid votes.

Moreover, even if the Democratic Party is right that a re-vote or new election cannot be conducted immediately (and they are not), this court still has the power to set aside the election results and nullify the certificate of election, and thus the only debatable question is *when* a new election or new vote will take place. As explained below, Petitioners contend that under the contest statute, this court's plenary authority, and Supreme Court precedent, this court has the authority to order a re-vote of the November 2004 general election immediately. In any event at the latest, if the court sets aside the election results, there will be a new election in November 2005 by operation of Article III, section 10 of the Washington Constitution. For all these reasons, the motion to strike Petitioners' request for relief should be denied.

II. ARGUMENT

The Democratic Party's motion suggests that the only relief sought by Petitioners is an order for a new election. This is misleading. While it is true that Petitioners seek a revote or a new election as soon as permitted by law, there is no question that Petitioners have also asked to have the tainted initial results of the November 2004 gubernatorial election set aside and the Certificate of Election nullified. All of the Democratic Party's arguments go to the propriety of the additional relief of a re-vote or a new election, and those arguments lack merit, as explained in detail below.

A. The Motion to Strike is Improper and Premature.

The Democratic Party takes the unusual step of filing a stand-alone motion to strike, or in the alternative dismiss, Petitioners' prayer that seeks an order directing that a new election be conducted "as soon as practicable." Civil Rule 12(f) provides for striking "redundant, immaterial, impertinent, or scandalous matter" from the petition. Courts "hesitate" to grant motions to strike pleadings, Moore's Federal Practice, Vol. 1, p. 660.

The Democratic Party does not show the words "as soon as practicable" in the Petition are "redundant, immaterial, impertinent, or scandalous."

Any substantive attack on the merits of the Petition and the availability of the relief sought must go forward under the strict requirements of Civil Rule 12(b)(6). Under that standard, the question before the court is "whether it can be said that there is no state of facts which plaintiff could prove entitling him to relief under his claim." *See Grimsby v. Samson*, 85 Wn.2d 52, 55, 530 P.2d 291, 293 (1975). The factual allegations in the petition must be accepted as true for the purpose of the motion. *Hofto v. Blumer*, 74 Wn.2d 321, 444 P.2d 657 (1968). As discussed in detail in Petitioners Opposition to Motion to Dismiss Causes of Election Contest, the Petition states facts sufficient to state a claim for relief in an election contest, including setting aside the initial results of the election, nullifying the certificate of election, and ordering a re-vote or a new election to determine who will be governor.

B. The Petition Also Seeks Relief Expressly Provided for by the Contest Statutes.

As the Democratic Party concedes (albeit in a footnote, Motion at 2 n.2), the Petitioners' prayer for relief seeks, among other things, to annul the election and void the certificate of election. Petition Section VII (Relief Requested). It is undisputed that the election contest statute expressly provides for these remedies. *See* RCW 29A.68.050 ("annulling and setting aside such election"); RCW 29A.68.120 ("the certificate issued shall be thereby rendered void"). Thus, there can be no serious dispute that the court can set aside the initial results of the election, and nullify the certificate of election. As explained below, there is also no question that, if the election results are set aside, there will be a re-vote or a new election to follow. The only question is *when* it is possible to conduct a re-vote or hold a new election. The Democratic Party's disagreement as to the appropriate timing does not mean that some of Petitioner's requested relief for a new election "as soon as practicable" should be stricken.

C. The Court has the Power to Order a Re-Vote Immediately to Correct Errors and Neglect in the November 2004 Election.

1. The Court has Authority to Order Elections Officials to Conduct a Re-Vote.

RCW 29A.68.011 explicitly grants this court the power to "require any person charged with error, wrongful act, or neglect to forthwith correct the error, desist form the wrongful act, or perform the duty and to do as the court orders." (Emphasis added.) The plain language of RCW 29A.68.011 confers broad power upon courts to remedy election errors and neglect. The pleadings allege that as a result of wrongful acts or neglect on the part of the defendants, large numbers of illegal votes were cast in the November 2004 gubernatorial election. If the allegations of widespread illegal voting, well in excess of the margin of victory, are true, the only way to correct the illegal dilution of votes cast by legal voters is to direct the election officials to carry out their duty, and re-vote the election.

In 1975, the Supreme Court confirmed that a superior court has the power to order a new election when, due to neglect by elections officials, it was impossible to determine who received the most valid votes. *See Foulkes v. Hays*, 85 Wn.2d 724 (1975). In that case, the Court expressly held that the earlier codification of RCW 29A.68.011¹ conferred on a superior court the power "to order a new election where no other remedy would adequately correct distortions in election results caused by fraud or neglect" and that this authority also flows from the court's equitable powers. *Id.* (emphasis added). The Supreme Court further held that a superior court's authority, whether based on the "specific statute or the general equity jurisdiction," carries with it "all the means to carry it into effect." *Id.* at 623-33. In holding that a trial court has alternative authority under

¹ RCW 29A.68.011 was previously codified as RCW 29.04.030. The present version is almost identical to the previous version, with the addition of RCW 29A.68.011(6), which extends judicial power to situations where "[a]n error or omission has occurred or is about to occur in the issuance of a certificate of election." Curiously, the Democratic Party seems to argue that through this *expansion* of judicial power, the legislature somehow acted to limit the power to order a re-vote that was explicitly recognized in *Foulkes*. *See* Motion at 11 n.5.

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RCW 29.04.030 (the predecessor of 29A.68.011) to order new elections under circumstances outside those governed by RCW 29.65.010 (the predecessor of 29A.68.020), the court noted that "where the remedy provided in an election contest statute does not apply to a particular challenge and is not made exclusive, we have held that the power of a court to entertain that action under another head of its jurisdiction is unaffected." *Id.*, *citing State ex rel. Hyland v. Peter*, 21 Wash 243, 57 P. 814 (1899). The holding of *Foulkes* is on point and dispositive of the question of scope of this court's authority in this case.

The Democratic Party cites Becker v. Pierce County, 126 Wn.2d 11, 18 (1995) as the sole case supporting their contention that this court lacks the authority to order a revote. See Motion at 11. This is a misreading of the holding in the case. In Becker, a candidate for the state auditor position, who lost in the primary, filed the case over a year after the general election, claiming that her opponent in the primary should have recused himself from the canvassing board in Pierce County. Id. at 14. In an effort to overcome the statutory deadlines for submitting affidavits as prescribed by RCW 29.04.030(3) and (6), she argued that her lawsuit was being brought solely under RCW 29.04.030(4), which contained no such deadline. Id. at 20. She appealed the trial court's dismissal, and the Supreme Court affirmed, holding (1) that the county auditor was not required by RCW 29.62.030 to recuse himself from the canvassing board for purposes of certifying the state auditor election and (2) that Article I, sections 1, 19, and 32 of the Constitution did not create independent grounds to contest the nomination and election of county auditor. The Court although acknowledging that its consideration of the question was unnecessary to the resolution of the case, see Becker, 126 Wn.2d at 19, nonetheless addressed the timeliness issue, deciding that the action was barred by the statute of limitations in the contest statute. Id. at 17-21. In doing so, the Court observed in two sentences the relief Becker sought:

The relief sought by Becker is the same as would result from a successful election contest: the setting aside of the election. . . . [Ilf Becker were limiting her claim for relief to that provided by RCW 29.04.030(4) alone, invalidation of the election, the relief she seeks, is not a possible result. Under that statute, the only relief that a court may afford is to order that the offending person "forthwith correct the error, desist from the wrongful act, or perform the [neglected] duty and to do as the court orders." We conclude, therefore, that Becker's action is an election contest, and as such, is subject to the time limitations set forth in RCW 29.04.030 [now RCW 29A.68.011].

Becker, supra, 126 Wn.2d at 20-21 (emphasis added). The Democratic Party asserts that the italicized phrase is a holding that no provision of RCW 29A.68.011 permits a court to set aside an election under any circumstances. The Becker dictum cannot be read so broadly.

Foulkes expressly held in 1975 that courts have the general equitable power, as well as explicit statutory authority under the predecessors to RCW 29A.68.011 and .020, to set aside an election and to order a re-vote in appropriate circumstances. Contrary to the Democratic Party's assertions, the Becker court did not overrule this central holding in Foulkes. While Becker contains dicta that invalidation of the election of state auditor by the loser of the primary, based solely on RCW 29.04.030(4) (predecessor to RCW 29A.68.011), is "not a possible result," id. at 20-21, the court did not even mention Foulkes and did not perform any analysis of the grant of power contained in RCW 29.04.030 in reaching this conclusion. Becker cannot be read as repudiating the central holding of Foulkes, absent some indication that the Supreme Court determined that the Foulkes rule was "incorrect and harmful." See Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930, 935 (2004), citing In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

Absent clear direction from the Supreme Court that it intended to overrule *Foulkes*, this court is bound to follow the rule established in *Foulkes*. *E.g.*, *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989) (if a precedent has direct

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application in a case, yet appears to rest of reasons rejected in other decisions, lower courts should follow the case that controls directly, leaving it to the Supreme Court to decide whether to overrule its own decisions); *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) (same).

2. A Re-Vote is Merely a Continuation of the November 2004 General Election, Not a Separate or Special Election.

The Democratic Party also argues that other statutes and provisions of the Constitution, when knitted together as they propose, prohibit this court from ordering a special election. However, the statutory and constitutional prohibitions posited by the Democratic Party simply do not apply to prevent a re-vote in the gubernatorial race in the November 2004 election. What petitioners seek is *not* a special election, but simply a new vote in the tainted and still incomplete November 2004 election. The issuance of the certificate of election does not represent the end of that process--any more than the conclusion of the first machine count of the ballots--as the contest statute confirms by allowing a contest action to be filed as late as 10 days after the issuance of the certificate. RCW 29A.68.011; see also 26 Am. Jur. 2d 370 ("A certificate of election is not a title to a public office, but a mere muniment of title. It is only prima facie evidence of the office holder's right to the office" but only until "the true result of the election is determined in the manner provided by law.") Nothing in the election contest statute, or the cases interpreting it, preclude such a common-sense remedy, and cases in analogous situations from other jurisdictions confirm that courts may order a re-vote or new election as part of the original election without running afoul of statutory or constitutional limits that would otherwise preclude a special election conducted on the same day. See Public Citizen v. Zell Miller, 813 F. Supp. 821 (N.D. Ga. 1993) (candidate challenged run-off election as violating federal law that required senate elections to be conducted exclusively on November 3; court held that the subsequent run off election "does not reschedule the earlier general election" because the initial result of the general election on November 3

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was a "failure to elect"); *c.f.*, *Castillo v. State of Texas ex rel. Saenz*, 404 S.W.2d 97, 98-99 (Tex. Civ. App.1966) (because it was impossible to complete the necessary steps for an election by the time prescribed in the statute, it was permissible to hold it later; "We cannot infer that the Legislature intended, if it was impossible to hold a legal election on April 6, 1965, then, in that event, the election should never be held.").

To agree with the Democratic Party's narrow view of this court's authority would be to find the court impotent to order a sensible remedy in the face of serious violations of law and duty by elections officials that have resulted in the dilution of lawful votes, the counting of illegal votes, and an election so tainted by error and neglect that is impossible to determine which candidate received the most legal votes. This cannot be the law. It is well established that the courts of the State of Washington have broad, inherent equitable powers regardless of the statute in question. See Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 405-06 (1936). It is also true that "election statutes are considered remedial and should be liberally construed," Gold Bar Citizens for a Good Government v. Whalen, 99 Wn.2d 724, 665 P.2d 393 (1983), citing Columbia River Salmon & Tuna Packers Ass'n v. Appling, 375 P.2d 71 (Or. 1962). Given these two principles, it cannot be the case that this court is powerless to remedy the injustices that have taken place, and as noted, Foulkes confirms that this court has the necessary authority. Foulkes, 85 Wn.2d at 633 (court has "all the means to carry its authority to hear election contests into effect" and ordering a new election where that was necessary in light of its inability to determine who really won).

The Democratic Party cannot seriously argue that if, due to the neglect of elections officials, all the ballots in King County were lost or destroyed before they could be counted in a particular election, that a court would have no power to remedy the situation by ordering an immediate re-vote as part of that election. Likewise, the Democratic Party cannot seriously argue that the constitutional provisions and statutes governing vacancies

and special elections would preclude such a remedy, and that a court would be powerless in the face of such egregious injustice.

D. Even if the Democratic Party is Right, the Only Consequence is a Delay in the Conduct of a New Election Until November 2005 at the Latest.

As outlined above, the court has the necessary statutory and equitable authority to order elections officials to conduct a re-vote as part of the November 2004 general election and that it be conducted as soon as possible. However, even if the Democratic Party is right that setting aside the election results and nullifying the Certificate of Election, as requested by the Petitioners, results in a vacancy in the Office of Governor (*see* Motion at 6), the only consequence is that, by operation of Article III, section 10 of the Constitution, the Lieutenant Governor would fill the office until a new election is conducted at the next general election in November 2005. The Democratic Party's contention that the Constitution and the election statutes prevent a new election until 2008 ignores the plain language of the constitution, and would require amending the constitution to give effect to the relevant constitutional provisions.

1. The Constitution Allows a November 2005 Election.

Constitution Article III, section 10, on which the Democratic Party relies, expressly provides for a new election to replace the lieutenant governor at the "next general election":

Any person succeeding to the office of governor as in this section provided, shall perform the duties of such office only until the disability be removed, or a governor be elected and qualified; and if a vacancy occur more than thirty days before the next general election occurring within two years after the commencement of the term, a person shall be elected as such election to fill the office of governor for the remainder of the unexpired term.

Const. art. III, § 10 (emphasis added). Because the vacancy would occur more than 30 days before the next general election within two years of the beginning of the term, there would

be a new election for governor in that "next general election," which the Democratic Party acknowledges will be in November 2005. *See* Motion at 5.

A similar procedure controls when Supreme Court Justice positions become vacant. Article IV, section 3 is similar to Article III, section 10, in that it requires that Supreme Court Justices be elected "at the general state election at the times and places at which state officers are elected" and states that vacancies shall be filled at the next succeeding general election to fulfill the remainder of the term. There have, of course, been several odd-year Supreme Court elections, most recently for Justice Sanders in 1995 after Justice Pekelis had been appointed to fill the position vacated by Justice Guy, for Justice Derham in 1985, Justice Dimmick in 1981, and Justice Brachtenback in 1973.

Citing *Fish v. Howell*, 59 Wash. 492, 498 (1910), the Democratic Party argues, however, that any election held prior to the end of the four year term constitutes a "special election" in violation of mandate of Article III, section 10 to fill the vacancy during a "general election." Motion at 6 & 7. The Democratic Party's reliance on *Fish* to interpret Article III, section 10, is badly misplaced. That case was decided prior to amendments to Article III that now provide for a the election of a new governor at the "next general election" and analyzes a question about a Secretary of State election without making any reference to Article III, section 10. Indeed, in a subsequent case the Washington Supreme Court, analyzing Article XI, section 6, which parallels Article III, section 10, refused to follow the reasoning in *Fish*. *DeBow v. McNeil*, 127 Wash. 157 (1923) (vacancy holder not entitled to hold position for the remainder of the four-year term). Holding that constitutional provisions like Article III, section 10 provide the "machinery for the election

² The original text of Article III, section 10 was limited to the first sentence of the current Article III, section 10, and provided only that the duties of the Governor fall upon the Lt. Governor in the event of a vacancy in that office. *See, e.g., State v. McBride*, 29 Wash. 335, 70 P. 25 (1902) (holding under this version of the constitution that when a Governor died in office, the Lieutenant Governor filled the duties of Governor for the remainder of the full four-year term).

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of officers to fill unexpired terms of office," the Supreme Court rejected the argument that filling the vacancy during a general election (held during the pendency of four-year term) would constitute a "special election." *Id.* at 162-63.

The Democratic Party's interpretation of Article III, section 10 as prohibiting an election prior to the completion of the four-year term in 2008, directly contradicts the plain language of that very provision which plainly states that a person "shall be elected" to fill the office of governor for the "remainder of the unexpired term."

Further, as the Democratic Party's own authority establishes, provisions of RCW 29A regarding elections cannot prevent a November 2005 election to fill the vacancy in the governor's office, because provisions in the election code are subordinate to the constitutional provisions. Motion at 7 (collecting cases).³

2. The Democratic Party's Constitutional Interpretation Requires Amending the Constitution.

The Democratic Party cannot reconcile the express requirement of Article III, section 10 to hold elections to fill the office for the "remainder of the unexpired term" with its proffered interpretation of other constitutional provisions addressing the election of the governor. For example, Article III, section 1 requires the election of the governor "at the

³ Past experience also suggests that, if the court simply sets aside the election results (without question a remedy available under the statute), the Legislature will pass whatever laws are necessary to satisfy constitutional requirements and provide for a new election promptly. For example, after the death of the Secretary of State, the Legislature went into special session amending what is now RCW 29A.04.321 to fill the vacancy at the 1975 general election. See Daly v. Chapman, 85 Wn.2d 780 (1975). Similarly, in 1983, after Senator Scoop Jackson died, the Governor called for a special election to fill the vacancy, in accordance with RCW 29.13.020 (now RCW 29A.04.321). Because there was not enough time to hold a regular registration period and primary for the seat, the legislature convened on September 10, 1983, passed legislation that allowed the primary and general election, and was adjourned. The Governor signed the bill that same day. Laws of Washington 1983, 3d. Ex. Session, Ch. 1. And more recently when, in February 2004, the Supreme Court refused to hear an appeal of the Ninth Circuit's finding that Washington's blanket primary was unconstitutional, the Legislature passed Engrossed Senate Bill 6453 as an emergency measure, establishing a new primary system and implementing it in time for the September primary.

same time and place of voting as for members of the legislature." The Democratic Party insists that holding mid-term elections to fill a vacancy (as expressly provided by Article III, section 10), would require "amending the Constitution (specifically, Article III, section 1) to allow election of the governor "separately" from the "other Article III, section 1 officers" Motion at 5. Courts, however, disfavor interpretations that require amendment of the constitution. *Northshore School District No. 417 v. Kinnear*, 84 Wn.2d 685, 715 (1975) (court's function is to "harmonize wherever possible any seeming conflicting provisions so that the whole constitution is left intact"), *overruled on other grounds*, *Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476 (1978).

This is especially so where, as here, it completely unnecessary, and the more reasonable interpretation harmonizes all the relevant provisions. In fact, elections to fill vacancies in the Office of Governor can take place consistent with the Constitution as written, just as they have taken place many times to fill vacancies in Supreme Court positions under very similar language in Article IV, section 3. Article III, section 1 already provides for elections "severally" of executive officer at the "same time" as members of the legislature. Simply by holding elections in November, a vacancy in the governor's office can be filled "severally" at the "same time" as is authorized for the election of legislators by Article II, section 15 and RCW 29A.04.321(c). Neither the plain text, nor any legal authority cited by the Democratic Party, requires conducting an election of all executive officers to fill the vacancy of a single officer. The Court should reject the Democratic Party's unsupported interpretation of Article III, section 1 that would require a "constitutional amendment" to harmonize it with Article III, section 10 that provides a mechanism for filling of vacancies in the governor's office for the "remainder of the unexpired term."

The Democratic Party argues that under Article III, section 1, even with a constitutional amendment, a new election "could not take place until November 2006."

Motion at 5. Presumably the Democratic Party bases this argument on the language in Article III, section 1 that requires elections of the governor at the "same time" as voting for members of the legislature. *See* Motion at 5 ("the next general election at which legislators will stand for election is November 2006."). However, both the Washington Constitution, Article II, section 15, and Washington election statutes, RCW 29A.04.321(c), provide for the election of legislators on odd years, including November 2005.

The Democratic Party also claims the omission of the office of Governor from RCW 29A.04.321(c) as having the effect of prohibiting an election to fill a vacancy in the office of Governor in an odd-numbered year. That reading of the statute is a red herring and cannot be sustained. In *Fish*, the Supreme Court held that absent Legislative action, a constitutional officer appointed by the Governor to fill a vacancy under Article 3 section 13 would serve the remainder of the unexpired term. The predecessor to RCW 29A.04.321(c) was enacted so that an election would be held to fill any unexpired term for those offices. There was obviously no reason to (and it would have been unconstitutional to) add the Governor to the list of offices covered by this section because election for that office was already constitutionally mandated by Article 3 section 10 as amended. The Democratic Party's interpretation of RCW 29A.04.321 would directly conflict with Article 3, section 10 of the constitution and would lead to the absurd conclusion that the Legislature intended that a vacancy in any elective office in the state -- whether statewide, local, or federal -- except the office of governor, should be filled by the voters at the next general election.

If setting aside the election results and nullifying the Certificate of Election results in a vacancy that must be filled through a new election, as the Democratic Party argues, holding a November 2005 election would be consistent with and give full effect to other constitutional provisions identified by the Democratic Party: It would fill the vacancy in the next general election (Article III, section 10) on a date for legislative elections in

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November (Article II, section 5); the term could commence in January (Article III, section 4) and extend through the remainder of the unexpired term (Article III, section 2). This construction of the relevant provisions gives full effect to each of these sections of the Constitution in such a way that the "whole constitution is left intact." See Northshore, 84 Wn.2d at 715.

In any case, the fact that the Constitution might be construed to require that any new election be held in November 2005 is, of course, is no reason to strike the request for a new election "as soon as practicable."

III. CONCLUSION

There is no basis for striking from the Petition the statement of relief requested by Petitioners. Petitioners have requested relief that is specifically provided for in the election contest statutes and relief that has been expressly approved by the Supreme Court: setting aside the election results and ordering a re-vote as soon as possible. Even if the Democratic Party is right that setting aside the election results will trigger a vacancy in the office of Governor, the *latest* a new election would be conducted, pursuant to the Constitution, is November 2005. Because the relief sought is provided for by statute and controlling precedent, and because the only disputed question is when a new vote or election may be conducted, the motion to strike the requested relief must be denied.

DATED this 2 (day of January 2005.

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